

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

CASE NO. C17-0178JLR

**PLAINTIFFS' JOINT RESPONSE TO
DEFENDANTS' MOTION TO STAY ALL
PROCEEDINGS**

JEWISH FAMILY SERVICE, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

CASE NO. C17-1707JLR

(RELATING TO BOTH CASES)

1 Plaintiffs jointly and respectfully oppose, in part, Defendants’ Motion to Stay All
 2 Proceedings (“Defs.’ Mot.”), Dkt. No. 172, which wrongly claims that Department of Justice
 3 attorneys are prohibited from working on these consolidated cases. Plaintiffs oppose Defendants’
 4 request to indefinitely extend the paper discovery deadlines pending the end of the partial
 5 government shutdown, but are prepared to meet and confer with Defendants as to a reasonable
 6 extension if actually needed. Given that the depositions would be most efficiently conducted after
 7 the production of written discovery in any event, however, Plaintiffs do not oppose a modest
 8 extension of the deadline for Defendants to produce deponents pursuant to this Court’s Order
 9 Granting in Part and Denying in Part Plaintiffs’ Joint Motion to Compel, Dkt. No. 171.¹

10 Defendants’ Motion suggests that good cause² exists to modify the current case scheduling
 11 order—in particular, to extend indefinitely Defendants’ February 3 deadline to produce
 12 supplemental discovery—because the partial government shutdown means that Defendants’
 13 counsel is “prohibited from working on this matter” by the Antideficiency Act, 31 U.S.C. § 1342.
 14 *See* Defs.’ Mot. at 2. But Defendants are simply wrong on the law, as this case falls well within
 15 the activities permitted under both the Antideficiency Act and the Department of Justice’s own
 16 Fiscal Year 2019 Contingency Plan for operations during a lapse in appropriations.

17 The Antideficiency Act prohibition does not apply to “emergencies involving the safety of
 18 human life or the protection of property.” 31 U.S.C. § 3142. That standard is met when there is
 19 “some reasonable and articulable connection between the function to be performed and the safety
 20 of human life or the protection of property” and “some reasonable likelihood that the safety of
 21 human life or the protection of property would be compromised, in some degree, by delay in the
 22 performance of the function in question.” 43 Op. Att’y Gen. 293, 302 (Jan. 16, 1981). As its
 23 Contingency Plan notes, the Department of Justice’s mission and duties mean that the Department
 24 “has a high percentage of activities and employees that are excepted from the Antideficiency Act
 25

26 ¹ Unless otherwise noted, all citations are to the docket in *Doe v. Trump*, C17-0178JLR.

27 ² Because it seeks to modify the Court’s scheduling order, Defendants’ Motion is governed by the “good
 28 cause” standard of Federal Rule of Civil Procedure 16(b)(4) and Local Rule 16(b)(5). *See* Order, Dkt. No.
 171, at 17 (discussing this standard).

1 restrictions and can continue during a lapse in appropriations.” DOJ Contingency Plan at 1,
 2 *available at* <https://www.justice.gov/jmd/page/file/1015676/download>; *see also id.* at 2 (reporting
 3 that, as of the beginning of Fiscal Year 2019, 84% of DOJ employees would continue working in
 4 the event of a lapse in appropriations). As to civil litigation specifically, the Plan explains that
 5 DOJ attorneys should seek to stay cases only if doing so would not “significant[ly]” affect “the
 6 safety of human life or the protection of property.” *Id.* at 3. That determination, however, is
 7 ultimately a legal one that is up to the courts, as the Plan explains: “If a court denies such a request
 8 and orders a case to continue, the Government will comply with the court’s order, which would
 9 constitute express legal authorization for the activity to continue.” *Id.*

10 Under the case-by-case approach required by the Antideficiency Act and the DOJ’s own
 11 Contingency Plan, this case falls within the scope of activities the Department of Justice is
 12 authorized to continue notwithstanding the lapse in appropriations. By definition, refugees
 13 awaiting resettlement through USRAP—including Individual Plaintiffs and the clients of the
 14 Organizational Plaintiffs in these consolidated cases—have been determined by the U.S.
 15 government to be at risk of persecution because of a protected characteristic (race, religion,
 16 nationality, membership in a particular social group, or political opinion). *See* 8 U.S.C. § 1101
 17 (a)(42) (definition of “refugee”). Most of them, also by definition, have fled their home countries
 18 because of that risk of persecution. *See id.* (providing a limited exception to the requirement that
 19 an individual be outside of their home country to be considered for refugee status). Of the world’s
 20 refugees, moreover, fewer than 1% are referred for a resettlement. *JFS*, Compl. ¶ 30, Dkt. No. 1.
 21 Those who are resettled through USRAP are the “most vulnerable” refugees at the “highest risk”
 22 of further persecution or other forms of violence. Dep’t of State, Refugee Admissions,
 23 www.state.gov/j/prm/ra/ (last visited Jan. 3, 2019); *accord JFS*, Compl. ¶ 30, Dkt. No. 1; *Doe*,
 24 Compl. ¶ 107, Dkt. No. 42. And as the Court is aware, this case challenges Defendants’ unlawful
 25 extension of the time refugees must stay in their precarious circumstances, *see, e.g.,* Order, Dkt.
 26 No. 92, at 34; and the limited discovery that remains outstanding is targeted specifically at
 27 compliance with this Court’s order requiring Defendants to undo the effects of two specific,
 28

1 unlawful delays they imposed on large categories of refugees. *See generally* Order, Dkt. No. 171.

2 The Antideficiency Act does not bar the Department of Justice from continuing to work on
3 these cases, as other courts have recently held in similar circumstances. *See* Order, *Doe v. Nielsen*,
4 No. 5:18-cv-02349 (N.D. Cal. Jan. 3, 2019), ECF No. 147 (denying government request to stay
5 discovery and deadlines in case challenging the government’s decision to deny resettlement
6 through USRAP, en masse, to 87 Iranian refugees “currently ‘in limbo’ in Vienna, Austria” due in
7 large part to the U.S. government’s “unsubstantiated rejections of their applications for refugee
8 resettlement”); Minute Order, *O.A. v. Trump*, No. 18-cv-02718 (D.D.C. Dec. 27, 2018) (denying
9 government’s request to stay briefing deadlines in action challenging the recently issued asylum
10 ban targeting Central American migrants requesting asylum—notwithstanding that ban being
11 currently subject to a nationwide preliminary injunction (in a different case) that both the Ninth
12 Circuit and the Supreme Court recently refused to stay pending appeal, *see E. Bay Sanctuary*
13 *Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018)—because there was “some reasonable and
14 articulable connection between” the continuation of the case “and the safety of human life or the
15 protection of property” (citation omitted)); Minute Order, *Ramirez v. U.S. Immigration & Customs*
16 *Enf’t*, No. 1:18-cv-508 (D.D.C. Dec. 31, 2018) (denying the government’s unopposed motion to
17 stay discovery and other proceedings in an action challenging “the allegedly unnecessary and
18 illegal detention” of immigrant teenagers in “restrictive detention facilities”).³

19 To be clear, Plaintiffs are sympathetic to the possibility that the lapse in appropriations
20 could reasonably cause Defendants and/or their counsel delay in meeting the current deadline,
21 notwithstanding their best efforts and all due diligence, particularly if necessary agency personnel
22 are furloughed.⁴ Plaintiffs, moreover, are willing to meet and confer with Defendants to discuss

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24 ³ *See also* Order, *New York v. U.S. Dep’t. of Labor*, No. 1:18-cv-1747 (D.D.C. Dec. 28, 2018), ECF No. 71
25 (denying government’s stay request in action challenging new rule related to Affordable Care Act plan
26 requirements); Text Order, *California v. Health & Hum. Servs.*, No. 4:17-cv-05783 (N.D. Cal. Dec. 27,
2018), ECF No. 183 (denying government’s motion for a stay given the effective date of the challenged
rules for insurance coverage for contraceptives).

27 ⁴ Defendants’ Motion is silent on the effect of the lapse in appropriations on Defendants themselves but,
28 per public reporting, an estimated 87% of DHS employees continue to work notwithstanding the partial
government shutdown. *See* Ted Mellnik & Kate Rabinowitz, *Who Gets Sent Home When the Government*

1 necessary accommodations of the current schedule.⁵ For example, Plaintiffs do not oppose a short
 2 extension of the deadline to complete the four depositions, which Plaintiffs believe would best
 3 occur after the production of document discovery regardless. Likewise, Plaintiffs would
 4 understand if Defendants need slightly more time to answer the set of six interrogatories. But there
 5 is no reason to believe that the rest of the discovery ordered by this Court—the re-production of a
 6 limited set of documents without particular redactions, and the production of eight specific
 7 policy/training documents previously withheld as “non-responsive”—should require much in the
 8 way of time or effort. More importantly, the only basis Defendants have provided for a stay or
 9 extension of the discovery deadline is their erroneous legal conclusion that Defendants’ counsel
 10 are prohibited from working on the case. The stakes are too high for Plaintiffs to agree to
 11 indefinitely draw out the what remains of this case, particularly the deadlines for production of the
 12 paper discovery, which—although not burdensome—all further progress of this case depends.

13 In light of the foregoing, Plaintiffs do not oppose a short extension of the deadline for
 14 Defendants to produce the deponents—Plaintiffs suggest extending that deadline to two weeks
 15 after Defendants have completed the production of the paper discovery ordered by this Court on
 16 December 20—but they do respectfully oppose Defendants’ Motion to the extent that it seeks a
 17 modification of the paper discovery deadlines. Plaintiffs would have no objection to Defendants
 18 renewing their motion as to the deadline to produce particular discovery after the parties have met
 19 and conferred and upon a showing of good cause.

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 25 *Shuts Down*, Wash. Post (Dec. 22, 2018), <https://wapo.st/2RtxaL3>. Current State Department numbers are
 26 not publicly available, *see id.*, but during the 16-day government shutdown in 2013, it “furlough[ed] only
 a few hundred of its 70,000 employees.” Eric Katz, *Agencies to Start Increasing Furlough Numbers as*
Shutdown Drags On, Gov. Exec. (Dec. 28, 2018), <https://bit.ly/2SyAKAX>.

27 ⁵ The entirety of the parties’ correspondence since this Court granted in part Plaintiffs’ Joint Motion to
 28 Compel on December 20, 2017 is attached hereto as Exhibit A.

Respectfully submitted,

DATED: January 3, 2019

s/ Lauren Watts Staniar

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2019, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all of the registered CM/ECF users for this case.

DATED this 3rd day of January, 2019.

/s/ Lauren Watts Staniar